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No. _____

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In The

Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

Petitioner,

v.

DONALD M. PARADIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is Idaho's statutory aggravating factor which authorizes the death penalty for murders committed with utter disregard for human life unconstitutionally vague because the limiting construction of this factor announced by the Idaho Supreme Court does not require that it be applied with reference to the occurrence of specifically defined acts?

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For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

A. J. Arave, Warden of the Idaho State Maximum Security Institution, petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which granted federal habeas corpus relief to a prisoner sentenced to death on the ground that a statutory aggravating factor which is part of the Idaho death penalty statutes is unconstitutionally vague and was not interpreted by the Idaho Supreme Court in sufficiently narrow fashion.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Paradis v. Arave*, 954 F.2d 1483. A copy of the opinion is appended to this petition.

JURISDICTION

The opinion of the Court of Appeals was filed January 23, 1992. The Court of Appeals denied respondent Paradis' petition for rehearing and suggestion for rehearing en banc by an order filed June 9, 1992.

This case arose under 28 USC § 2254 and petitioner invokes the jurisdiction conferred on this court by 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the Constitution of the United States, provides in pertinent part:

> " . . . nor cruel and unusual punishment inflicted."

Title 28, § 2254(a), United States Code, provides, in pertinent part:

> [A] circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Idaho Code § 19-2515 provides, in pertinent part:

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the

court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

. . .

(6) By the murder, or circumstances surrounding its commission, the defendant exhibits utter disregard for human life.

Idaho Code § 19-2827(c) provides as follows:

(c) With regard to the sentence the [Idaho Supreme] Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the [sentencing] judge's finding of a statutory aggravating circumstance from among those enumerated in § 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed

in similar cases, considering both the crime and defendant.

STATEMENT OF THE CASE

Donald Paradis was convicted in an Idaho trial court of murdering Kimberly Ann Palmer. He was sentenced to death. Paradis' conviction and sentence were reviewed and affirmed by the Supreme Court of Idaho. *State v. Paradis*, 676 P.2d 31 (Idaho 1983). Thereafter, Paradis petitioned the state courts for post-conviction relief, which was denied. *Paradis v. State*, 716 P.2d 1306 (1986). Paradis filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho. The district court held an evidentiary hearing and denied relief. *Paradis v. Arave*, 667 F.Supp. 1361 (D.Idaho 1987). An appeal was taken to the United States Court of Appeals for the Ninth Circuit. A panel of the court of appeals rejected all of Paradis' claims except the contention that Idaho's statutory aggravating factor which applies to murders committed with "utter disregard for human life" was unconstitutionally vague. Considering itself bound by the decision in *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991), *cert. granted*, 112 S.Ct. 2963 (1992), the court vacated Paradis' death sentence. This Court has granted the state's petition for a writ of certiorari in *Creech* and this case turns solely on the Court's resolution of the issue presented therein.

The facts of the case to which the "utter disregard" facto was applied are these. In early June of 1980, Kimberly Palmer's mother saw her leave Spokane, Washington, in the company of Scott Currier. They were driving a Volkswagon van belonging to a friend, Brenda Russell. Three days later, on June 22, 1980, the bodies of Currier and Palmer were found in a sparsely populated forest area in the state of Idaho. Both had died violent deaths.

Law enforcement investigators believed at first that both murders had been committed in the State of Idaho. Later, evidence was discovered that led officers to believe that only Kimberly Palmer had been killed in Idaho and that Scott Currier had been beaten to death in a house in Spokane, Washington.

The proof against Paradis consisted of substantial physical and scientific evidence. Although there were evidentiary conflicts, the evidence believed by the jury established the following facts.

Scott Currier and Kimberly Palmer went to a house rented and occupied by Donald Paradis for the purpose of recovering guns Currier believed had been stolen by Paradis and his friends, who were members of a motorcycle gang known as the "Gypsy Jokers." Currier was brutally murdered by Paradis, Thomas Henry Gibson and Larry Evans. He was badly beaten and had been stabbed numerous times with a lawn dart. Kimberly Palmer was present when Currier was killed. Miss Palmer was placed in the Volkswagen van with Currier's body and driven into Idaho by Paradis, Gibson and Evans. Currier's body was dumped from the van in a remote forest location.

Kimberly Palmer escaped and was chased down a steep hill, caught and strangled to death by Paradis or one of the others.

Paradis and his accomplices set fire to Paradis' Spokane house and attempted to flee the area. Evans made good his escape but Gibson and Paradis were apprehended and brought to trial.

Paradis defended on the theory that both murders were committed in the state of Washington, where, by the time the Idaho trial occurred, he had been acquitted of the murder of Scott Currier. Contrary to his theory, the physical circumstances in which Palmer's body was found furnished the basis for an inference that she was still alive after petitioner and his accomplices reached Idaho and had been hunted down and murdered after trying to escape.

After a sentencing hearing, the trial court found that the cold, calculated decision to kill Kimberly Palmer, who was a stranger to Paradis, in order to cover up a crime, evidenced "utter disregard for human life," and thus established the existence of a statutory aggravating factor authorizing the imposition of the penalty of death. The sentencing judge found that the mitigating factors were not sufficient to justify a lesser sentence.

The United States Court of Appeals for the Ninth Circuit, relying on the decision in *Creech v. Arave, supra,* set aside the death sentence imposed on Paradis on the ground that the "utter disregard" factor had not been appropriately limited by the Idaho Supreme Court. This court has granted certiorari in *Creech v. Arave, supra,* for which reason the state brings this petition, asking that the

court hold the case to be resolved in accordance with the decision in *Creech v. Arave*.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals for the Ninth Circuit is inconsistent with this Court's decision in *Walton v. Arizona*, 110 S.Ct. 3047 (1990), the decision of the Court of Appeals for the Eleventh Circuit in *Harich v. Wainwright*, 813 F.2d 1082 (1987) and the decisions of the high courts of other states. See *People v. Lucas*, 548 N.E.2d 1003 (Ill. 1989); *Brown v. State*, 473 So.2d 1260 (1985). Part II of the court's decision, relying on *Creech, supra*, creates a standard for judging the sufficiency of statutory aggravating circumstances enacted by state legislatures which differs from that announced by this Court in *Walton*. This Court has granted the state's petition for a writ of certiorari in *Creech* and, inasmuch as this case will be decided by the Court's decision in *Creech*, the cause should be held for disposition in accordance therewith.

I

The Court of Appeals Holding Which Invalidated Idaho's "Utter Disregard" Aggravating Factor Is Inconsistent With This Court's Precedent In That It Misapplies Walton v. Arizona And Fails To Accord A Presumption Of Correctness To State Factual Findings

One of Idaho's statutory aggravating factors empowers the sentencing judge to impose the death penalty when, by a first degree murder "or the circumstances surrounding its commission, the defendant exhibits utter

disregard for human life." Idaho Code § 19-2515(g)(6). The Idaho Supreme Court applied a limiting construction to this statutory provision in *State v. Osborn*, 631 P.2d 187 (Idaho 1981). As the court construed section 19-2515(g)(6), it is to be applied to "acts or circumstances surrounding the crime which exhibit the highest, utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Osborn*, 631 P.2d at 201. By concluding that this factor does not overlap other aggravating factors, the Idaho court held that the "utter disregard" factor is not proved merely by showing the presence of some other factor, such as multiple murder, or an especially heinous murder. *Id.*

The Idaho Court's resort to descriptive terms like utmost callousness, pitilessness and cold-bloodedness, some of which were suggested to the Idaho Court by *Profitt v. Florida*, 428 U.S. 242, 255 (1976), refers the sentencing judge to words of common meaning and understanding. By this process, the "utter disregard" factor singles out killings that are not the product of significant emotional distress or provocation. Section 19-2515(g)(6) was thus made to apply at least to those killings which are the product of a desire to kill for the pleasure derived from murder or which reflect a willingness to kill for mere convenience, that is, a lack of any conscientious scruple against murder. The State of Florida applies a similar factor which authorizes the death penalty on a finding that a murder was committed in "a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. section 921.141(5)(i). See *Brown v. State*, 473 So.2d 1260 (1985); *Harich v. Wainwright*, 813 F.2d 1082 (11th Cir. 1987).

The Idaho Supreme Court is required by Idaho Code § 19-2827(c) to review the evidentiary support for sentencing findings, see *Osborn, supra,* and it must be assumed that the court found as a matter of fact that the murder was a calculated and cold-blooded act in accordance with the evidence to that effect. Cf. *Cabana v. Bullock,* 474 U.S. 376 (1986) (whether the sentencer or a state reviewing court makes the requisite finding of culpability is not an issue for a federal habeas court. A state supreme court's conclusion as to the factual correctness of a finding of culpability is entitled to a presumption of correctness). Instead of according the presumption of correctness to the state court's decisions, the court of appeals, by accepting the *Creech* rationale, concluded that the factual findings of the Idaho court did not demonstrate that Paradis was a cold-blooded, pitiless killer and that this illustrated the vagueness of the *Osborn* limiting construction.

Not only does the court of appeals' decision in *Creech,* and thus this case, improperly intrude upon the fact-finding functions of state courts, it also misapplies *Walton v. Arizona,* 110 S.Ct. 3047 (1990), by requiring the state to engage in exercises of statutory definition that this Court has not demanded. *Walton* holds that a state definition of vague terms is constitutionally sufficient if it provides *some,* though not mathematically precise, guidance to the sentencing authority. Thus, Arizona's "especially heinous" factor was found to be sufficiently limited by definitions that equated "cruelty" with mental anguish, "heinousness" with torture or physical abuse, and "depravity" with indifference to suffering. Most of these terms relate to subjective states of mind on the

defendant's part and are not objectively distinguishable from the defining terms used by the Idaho Supreme Court in Osborn.

The Court of Appeals' view of what *Walton* means adds a requirement for the identification of objectively determinable "specific acts," which would require the state to limit the applicability of its aggravating factor by a catalog of specific incidents of the defendant's behavior. The court's holding makes it nearly impossible to rely on any element of subjectivity in the definition of aggravating factors.

This Court has not imposed such restrictions on a state's right to define the cases to which the death penalty will apply, nor have other courts. In *People v. Lucas*, 548 N.E.2d 1003 (Ill. 1989), the Supreme Court of Illinois, distinguishing *Maynard v. Cartwright*, 486 U.S. 356 (1988), held that the term "especially brutal or heinous, indicative of wanton cruelty" was sufficiently narrow because the term "especially brutal or heinous" was modified by the requirement for a showing of "wanton cruelty." See also, *People v. Odle*, 538 N.E.2d 428 (Ill. 1988). Definitions of similar character are common in states with death penalty statutes. See, e.g., *Smalley v. State*, 546 So.2d 720 (Fla. 1989) ("utter indifference to suffering" to define "cruelty"); *Brown v. State*, 565 So.2d 304 (Fla. 1990) ("cold, calculated and premeditated"); *State v. Fullwood*, 373 S.E.2d 518 (N.C. 1988) ("conscienceless, pitiless, unnecessarily torturous.")

The opinion below threatens to open a new chapter in death penalty litigation in which the dominant theme

will be that state courts must define all potentially subjective terms with lists of specific acts. The Court of Appeals comes close to requiring that state courts reach mathematical precision in defining the reach of aggravating factors. The principle announced by the Court of Appeals in Part II of its opinion raises an issue of general importance which will be addressed by this Court in *Creech*.

CONCLUSION

Petitioner requests that this case be held for disposition in accordance with the decision in *Arave v. Creech*, No. 91-1160.

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD PARADIS, Petitioner-Appellant, v. A. J. ARAVE, Warden, Idaho State Penitentiary; AL MURPHY, Director, Idaho State Correctional Institution, Respondents-Appellees.	)	No. 87-4100 D.C. No. CV-86-1188-HLR OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued, Submission Deferred August 4, 1989
Resubmitted December 20, 1991
Seattle, Washington
Filed: January 23, 1992

Before: ALARCON, BEEZER, Circuit Judges, and NIELSEN*; District Judge.
Opinion by Judge Alarcon

ALARCON, Circuit Judge:

Donald Paradis, a state prisoner, appeals from the district court's denial of his petition for a writ of habeas corpus.

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* Honorable Leland C. Nielsen, United States District Judge for the Southern District of San Diego, sitting by designation.

Paradis seeks review of his conviction on the following grounds:

One. The evidence was insufficient to demonstrate that Kimberly Palmer was killed in the state of Idaho.

Two. The state failed to preserve exculpatory evidence.

Three. The introduction of evidence of another murder for which he was acquitted deprived him of his right to due process and violated the Double Jeopardy Clause.

Four. He was deprived of the effective assistance of counsel.

Five. He was denied a fair trial by the prosecutor's misconduct.

Six. The state trial judge erred in refusing to grant Paradis' motion for change of venue.

We conclude that Paradis has failed to demonstrate a violation of his federal constitutional rights during the guilt phase of the state-court proceedings. Accordingly, we affirm the district court's denial of that portion of the petition for habeas corpus relief regarding the judgment of conviction for first-degree murder.

Paradis also alleges that Idaho's death-penalty statute is unconstitutional. In our decision in Creech v. Arave, 943 F.2d 873 (9th Cir. 1991), we held unconstitutional the portion of Idaho's death penalty challenged in this appeal. Accordingly, habeas corpus relief must be granted concerning the penalty phase of the state-court proceedings.

FACTS

The underlying facts are set forth in great detail in Paradis v. Arave, 667 F. Supp. 1361 (D. Idaho 1987) and State v. Paradis, 676 P.2d 31 (Idaho 1983), cert. denied, 468 U.S. 1220 (1984). At about 12:45 a.m. on June 21, 1980, Kimberly Palmer and Scott Currier checked into the Paul Bunyan Motel in Spokane, Washington. This motel was around the corner from Paradis' house.

Shortly thereafter, Currier demanded his money back from the motel desk clerk. Currier told the clerk that he had found guns missing from the blue and white Volkswagen van he was driving. Currier also stated that he knew who took them, and he was going to retrieve them.

At approximately 6:45 a.m. on June 21, 1980, Ruth Jones saw a blue and white Volkswagen van with two or three individuals drive up Mellick Road in Post Falls, Idaho. About a half-hour later, Jones saw Paradis, Thomas Gibson, and Larry Evans walking toward her house in the opposite direction. On June 22, 1980, the police found the bodies of Palmer and Currier off of Mellick Road near the overturned Volkswagen van.

DISCUSSION

A. Sufficiency of the Evidence

Paradis argues that the physical evidence and medical testimony presented at trial was insufficient for the jury to determine beyond a reasonable doubt that the murder of Palmer occurred in Idaho. He further alleges that evidence relating to a labial tear suffered by Palmer

is irreconcilable with her death in Idaho. We have independently reviewed the entire record of the guilt phase of the trial. We conclude that a rational jury could have been persuaded beyond a reasonable doubt that Palmer was murdered in the state of Idaho.

Paradis "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 (1979). The evidence must be reviewed "in the light most favorable to the prosecution." Id. at 319. "All reasonable inferences supporting the conviction must be drawn, including decisions regarding the credibility of witnesses." United States v. Beecroft, 608 F.2d 753, 756 (9th Cir. 1979). State court factual findings are entitled to a presumption of correctness. 28 U.S.C. 2254(d); Sumner v. Mata, 455 U.S. 591, 591-92 (1982).

The testimony adduced at trial indicates that Palmer's body was found face down in a stream bed. The body was located at the bottom of a steep slope about eighty feet away from the van. The terrain leading to the stream was covered with underbrush and debris. To reach the stream, a high, three-strand barbed wire fence located about halfway down the slope had to be crossed. In contrast, Currier's body was found in a blue sleeping bag about twenty to twenty-five feet down a steep embankment.

Palmer was wearing a pair of jeans, shoes, and socks. The front and back of the jeans were ripped. Her shirt was found beneath her body. An empty red sleeping bag was found about twenty feet in front of the van.

Dr. William J. Brady, the Oregon State Medical Examiner, testified that Palmer died of manual strangulation. Her lungs contained an unusual amount of fluid. He testified that this was consistent with the aspiration of water prior to her death after she had been manually strangled and placed face down in the stream. In addition, he noted that Palmer's body was not as decomposed as Currier's. Dr. Brady stated that in his opinion Currier had been dead a number of hours longer than Palmer.

Dr. Charles Larson, a defense medical expert, testified at the trial in state court that in his opinion Palmer was dead when she was placed in the stream. Dr. Larson stated that water would probably not enter the lungs if the dead body were placed in the stream when rigor mortis were [sic] present. After rigor mortis disappeared, the muscles of the throat would loosen and might allow water to enter. Detective Terry Thomason stated at trial that Palmer's body was very stiff when he found it. Dr. Larson further opined that the rates of decomposition of the two bodies would be altered by Palmer's body being put in a stream while Currier's was left in a sleeping bag. Therefore, he did not find it significant that Currier's body was more decomposed than Palmer's body.

Dr. Larson further testified that the tear on Palmer's labia appeared to have been inflicted after death because there was no evidence of blood around the wound. Based on the lack of blood from the wound, Dr. Larson concluded that the wound was probably caused when Palmer's dead body was passed under the barbed wire fence. Pamela Server, a forensic chemist with the Idaho State Crime Laboratory, testified during the state-court proceedings that she saw no blood stains on the jeans

when she examined them under ultraviolet light. She did not perform any chemical tests on the jeans.

Detective Thomason testified that most of Palmer's body was lying across the stream. On the day the body was found, there was a heavy rainfall. George Elliot, a lieutenant in the Kootenai County Sheriff's Office, testified that Palmer's jeans were wet when he removed them from her body. William R. Morig, a criminalist for the Eastern Washington State Crime Laboratory in Spokane, testified that exposure to water can interfere with the ability to detect human blood on clothing material.

Clearly, the jury accepted Dr. Brady's testimony and the prosecution's interpretation of the circumstantial evidence, and rejected Dr. Larson's conclusions. The lack of blood on Palmer's jeans does not render the jury's verdict irrational. The jury could have rationally inferred from all the evidence that any blood on the jeans was washed away by the combined effect of rain water and the flow of the stream.

We hold that the circumstantial evidence presented at trial, together with Dr. Brady's testimony, is sufficient, when viewed in the light most favorable to the prosecution, to support the jury's finding that the murder occurred in Idaho.

Paradis' attempts at the evidentiary hearing in the district court to attack the validity of Dr. Brady's testimony, and the cumulative evidence he presented relating to the labial tear does not affect our conclusion that the evidence produced at trial was sufficient to persuade a rational jury that Palmer was murdered in Idaho. In Sumner, 455 U.S. 591, the Supreme Court reiterated its

holding in Sumner v. Mata, 449 U.S. 539 (1981) by stating that:

> 28 U.S.C. 2254(d) requires federal courts in habeas proceedings to accord a presumption of correctness to state-court findings of fact. This requirement could not be plainer. The statute explicitly provides that 'a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , shall be presumed to be correct.' Only when one of seven specified factors is present or the federal court determines that the state-court finding of fact 'is not fairly supported by the record' may the presumption properly be viewed as inapplicable or rebutted.

Id. at 592.

The Idaho Supreme Court concluded from its review of the trial record that "[t]here was evidence at trial suggesting that Palmer was still alive when she was placed in the stream bed." Paradis, 676 P.2d at 33. The determination of a factual issue in a written opinion by a state court "shall be presumed to be correct." 28 U.S.C. 2254(d). Paradis has not argued or demonstrated that any of the seven exceptions to the presumption of correctness set forth in 28 U.S.C. 2254(d) (1) - (7) apply to this case. The factual determinations made in the state court are fairly supported by the evidence in the state court record. Paradis has failed to meet his burden of producing "convincing evidence" that Palmer was not murdered in Idaho. 28 U.S.C. 2254(d).

B. Failure To Preserve Exculpatory Evidence

Paradis contends that the state deprived him of his right to due process by failing to preserve and disclose evidence found at his home that was material to his defense that the murder was not committed in Idaho. He also alleges that the state of Idaho failed to conduct routine police investigations that would have produced exculpatory evidence. This court reviews de novo a claim that the prosecution improperly suppressed exculpatory evidence. United States v. Monroe, 943 F.2d 1007, 1012 (9th Cir. 1991).

Due process requires that the prosecution disclose exculpatory evidence within its possession. Brady v. Maryland, 373 U.S. 83, 87 (1963). In California v. Trombetta, 467 U.S. 479 (1983), however, the Supreme Court held that where the government fails to preserve evidence that is only potentially exculpatory, the right to due process is violated only if it possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489.

In Arizona v. Youngblood, 488 U.S. 51 (1988), the Supreme Court modified the Trombetta test by imposing the additional requirement that the defendant demonstrate that the police acted in bad faith in failing to preserve the potentially useful evidence. Id. at 58. "The presence or absence of bad faith by the police for the purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Id. at 57 n.*.

The mere failure to preserve evidence which could have been subjected to tests which might have exonerated the defendant does not constitute a due process violation. Id. at 57. The Youngblood majority strongly disagreed that "the Due Process Clause is violated when the police fail to use a particular investigatory tool." Id. at 59.

Paradis asserts that his due-process rights were violated by the State's failure to preserve a pair of panties and a cord found at Paradis' house during the murder investigation. Paradis failed to raise this claim in his appeal to the Idaho Supreme Court. He raised it for the first time before the district court in his habeas petition.

A state prisoner seeking habeas relief in federal court must exhaust his state court remedies. 28 U.S.C. 2254(b)-(c); Rose v. Lundy, 455 U.S. 509, 519 (1982). Where the state failed to raise the exhaustion defense either before the district court or on appeal, we may consider it waived if it is "perfectly clear that the applicant does not raise even a colorable federal claim."

Granberry v. Greer, 481 U.S. 129, 135 (1987). See Taylor v. Kincheloe, 920 F.2d 599, 602 n.1, (9th Cir. 1990) ("[W]here the issues are primarily ones of law and the State has failed in the district court and on appeal to point out the exhaustion defects, we believe the administration of justice would be better served by reaching the merits of [the] claims."); Stone v. Godbehere, 894 F.2d 1131, 1135 (9th Cir. 1990) ("Where, as here, the state failed to raise an exhaustion argument before the district court, we may consider it waived if the interests of comity, federalism and justice would be served."). In this case, the state

failed to raise the exhaustion argument before the district court. The issue was not presented to this court by the state. Accordingly, Paradis' failure to exhaust his remedies is waived.

Paradis has failed to demonstrate that the Washington state police acted in bad faith in failing to preserve the panties and the cord. Detective James Hansen and Detective Donald McCabe of the Spokane County Sheriff's Department testified that the items had not been intentionally destroyed. An extensive but unsuccessful search was made for the missing items. While the loss of this evidence may have been negligent, there is no evidence in this record that the police acted in bad faith in failing to preserve this evidence.

Paradis also asserts that his right to due process was violated by (1) the failure of Dr. Brady to preserve samples, conduct tests, take photographs or record observations at Palmer's autopsy; and (2) the failure of officers from Washington and Idaho to employ investigative procedures to preserve potentially exculpatory evidence.

Paradis has failed to demonstrate that Dr. Brady or the Washington and Idaho police acted in bad faith. Without such proof, we must reject his claim of a due-process violation premised on the failure to perform tests or employ particular investigative procedures. Youngblood, 488 U.S. at 59.

C. Evidence Relating to Currier's Murder

1. Due Process

Paradis argues that the state's introduction of evidence relating to Currier's murder was so prejudicial that

it violated his right to a fair trial. In order to violate due process, the erroneous admission of evidence must render the defendant's trial fundamentally unfair. Butcher v. Marquez, 758 F.2d 373, 378 (9th Cir. 1985). The state introduced evidence relating to Currier's death for two purposes: (1) to prove that Palmer died in Idaho by pointing out the differences between the location and the condition of the bodies of Currier and Palmer; and (2) to show a motive and common plan for the murder of Currier and the permanent silencing of Palmer.

Paradis contends that the evidence of Currier's murder was prejudicial because it related to a crime for which he was acquitted. In Dowling v. United States, 493 U.S. 342 (1990), the Supreme Court rejected the petitioner's claim that the introduction of evidence relating to a prior acquittal violated due process. Id. at 352-54. The Court instructed that the "tradition that the government may not force a person acquitted in one trial to defend against the same accusation in a subsequent proceeding. . . . [is] amply protected by the Double Jeopardy Clause." Id. at 354. It declined to "use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend." Id.

We are persuaded that the highly relevant evidence of the circumstances regarding the murder of Currier outweighed any potential prejudicial effect. Accordingly, we conclude that its admission was not so fundamentally unfair as to violate the Due Process Clause.

2. Double Jeopardy

Paradis argues that the admission of evidence relating to Currier's murder violated his Fifth Amendment protections against double jeopardy because he had been previously acquitted of Currier's murder. Paradis asserts that the introduction of the evidence of Currier's murder, combined with certain remarks by the prosecutor in closing argument, transformed this case into a retrial of the Currier murder.

In Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court held that the Fifth Amendment's guarantee against double jeopardy incorporated the collateral estoppel doctrine; thus barring the state from relitigating issues that had already been litigated before a jury. In Ashe, the defendant was retried for robbery after a previous jury had acquitted him on the determination that he was not one of the robbers. Id. at 445. The Supreme Court found that under the circumstances of that case, the second jury had to reach a directly contrary conclusion in order to convict the defendant. Id. The Court stated that the Fifth Amendment guarantee against double jeopardy "protects a man who has been acquitted from having to 'run the gantlet' [sic] a second time." Id. at 446, quoting Green v. United States, 355 U.S. 184, 190 (1969).

In Dowling, 493 U.S. 342, the Supreme Court declined to interpret the Double Jeopardy Clause as excluding relevant evidence simply because it related to criminal conduct for which the defendant had been acquitted. Id. at 348. The Court found that the protection of the Double Jeopardy Clause does not apply where the

prior acquittal does not determine an ultimate issue in the case. Id.

The record demonstrates that the Fifth Amendment's guarantee against double jeopardy was not implicated in this matter. The jurors were informed that Paradis had been acquitted of Currier's murder. The prosecutor argued that the evidence showed that Currier was killed in Paradis' residence. Therefore, Paradis had a motive to cover-up that killing by murdering Palmer. The jurors did not have to determine that Paradis killed Currier to find Paradis guilty of murdering Palmer.

D. Ineffective Assistance of Counsel

Paradis contends that he was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. We review de novo the question whether a defendant received ineffective assistance of counsel. United States v. Swanson, 943 F.2d 1070, 1072 (9th Cir. 1991). Paradis contends that his representation by William Brown was deficient for the following reasons: (1) Brown was inexperienced; (2) Brown's trial tactics were poorly conceived; (3) Brown ineffectively conducted the jury voir dire; (4) Brown did not conduct an adequate investigation before trial; and (5) Brown conducted the defense ineptly during trial.

The "benchmark" of any claim that the Sixth Amendment right to counsel has been violated is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on

as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). In Smith v. Ylst, 826 F.2d 872 (9th Cir. 1987), cert. denied, 488 U.S. 829 (1988), we held:

> It is well settled that for a defendant to prevail on a claim of ineffective assistance of counsel, he ordinarily must show (1) specific acts and omissions of counsel that fall below a standard of professional reasonableness, and (2) that these acts "prejudiced" the defendant because there "is a reasonable probability that absent the errors the factfinder would have had a reasonable doubt respecting guilt."

Id. at 875 (quoting Strickland, 466 U.S. at 694). This standard is "rigorous" and "highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 381-82 (1986). The defendant must overcome a "strong presumption that a lawyer is competent." Smith, 826 F.2d at 875. The Supreme Court articulated the policy behind this demanding standard in Strickland:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689 (citations omitted).

Paradis contends that Brown was too inexperienced to provide Paradis with effective assistance because he had passed the bar examination just six months prior to his appointment as Paradis' counsel, he had not taken any classes in criminal law, criminal procedure or trial advocacy during law school, and he had never tried a jury or felony trial.

The evidence demonstrates that Brown was not completely inexperienced in criminal matters. Brown had been a police officer for many years before he attended law school. Brown had an extensive background in law enforcement investigations and the court system. The record also shows that Brown had previously tried some misdemeanor cases for the prosecutor's office.

The Idaho Supreme Court and the district court found that counsel's efforts were of the "highest quality" and "exemplary." See Paradis v. State, 716 P.2d 1306, 1316 (Idaho 1986); Paradis, 667 F. Supp. at 1388. Paradis has failed to demonstrate that his trial counsel's performance was ineffective because of his inexperience.

Paradis asserts that Brown's trial strategy was poorly conceived. Paradis focuses on Brown's presentation of an alibi defense. The record shows that the alibi defense was suggested to Brown by Paradis. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691. Paradis has failed to rebut the presumption that "the challenged action 'might be considered sound trial strategy.' " Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

The record does not support Paradis' contention that Brown's voir dire of the jury was ineffective. Paradis asserts that Brown failed to question the jurors adequately regarding any preconceived notions they might have of Paradis' guilt. In addition, Paradis contends that Brown should have questioned the jurors regarding their ability to acquit based on Paradis' jurisdictional defense. Finally, Paradis argues that Brown should have challenged a juror who was a member of a church in which one of the prosecuting attorneys was a bishop.

Paradis relies on the testimony of Klaus Weibe, an attorney, to prove that Brown's actions on voir dire were ineffective. Weibe, however, was not present to observe the demeanor of the jurors when they responded to questioning. In addition, by his own admission, Weibe only reviewed the voir dire of the fourteen jurors that were impaneled and decided the case. Paradis has not demonstrated that Brown's conduct of the voir dire of the jury affected the outcome of the trial.

Paradis argues that Brown should have investigated several items of evidence in more detail, including the condition of Palmer's jeans and the sleeping bag found near the overturned van. Brown testified that he decided not to investigate these items because he did not want to put forth any evidence that might suggest that Palmer was sexually assaulted and inflame the jury against Paradis. Paradis has failed to overcome the presumption that counsel's strategy was sound.

Paradis also complains that Brown made no attempt to obtain the testimony of an FBI agent who had conducted tests on soil samples found on Palmer's shoes.

This argument is not supported by the record. Brown testified at the evidentiary hearing that he attempted to have the FBI agent present, but the state court denied the request on the ground that it was too expensive to fly the agent from Washington, D.C. to testify in person.

Paradis further alleges that Brown should have accepted the offer of help from Roger Peven, Paradis's trial counsel during the Currier trial in Washington. Brown testified at the evidentiary hearing that he did not seek Peven's assistance because he felt the offer was not serious. Paradis argues that Brown should have at least examined Peven's files. However, there is no evidence in the record that there was anything in Peven's files that Brown did not have or that would have affected the outcome of the trial.

Paradis claims that Brown made no effort to obtain evidence from the state authorities in Washington. The record shows, however, that Brown made a request to the Idaho authorities for exculpatory evidence. Paradis has not shown that any evidence from the state of Washington was withheld from the Idaho authorities. Thus, Paradis has not demonstrated that anything exculpatory would have been revealed had Brown requested the materials directly from Washington officers.

Paradis asserts that Brown failed to prepare Dr. Larson adequately for trial. We disagree. The record shows that Brown lead Dr. Larson through a point-by-point rebuttal of Dr. Brady's testimony.

Paradis argues that Brown failed to ask for the trial transcript of a potential witness, Roseanne Moline, and did not attempt to locate either Moline or Cindy Simera,

Gibson's wife. Both Moline and Simera were allegedly at Paradis's house on the night of the murders. Brown testified that he could not afford to look for Moline. He also pointed out that the FBI, as well as the Washington and Idaho police, were looking for Moline. Brown also testified that he had unsuccessfully tried to contact Simera. The record shows that Brown located Moline and presented her testimony in the motion for a [sic] new trial proceedings [sic].

Paradis also contends that Brown erred in failing to depose or question Dr. Brady prior to the trial. Paradis has not demonstrated that the failure to question Dr. Brady prior to trial affected the outcome of the trial. As noted above, the record shows that Brown presented an excellent rebuttal to Dr. Brady's testimony. See Paradis, 667 F. Supp. at 1388 (The rebuttal testimony of the defense's medical expert "provided a clear and cogent view of the evidence in this case and culminated in an opinion which, if adopted by the jury, could well have led to a verdict of not guilty.").

Paradis argues further that Brown was ineffective at trial. Paradis's complaints are based on attorney Weibe's hindsight opinions on how he would have tried the case. Brown's decisions during trial are presumed to be based on sound lawyering skills and strategy. Kimmelman, 477 U.S. at 381. Brown testified that he did not focus on issues concerning the labial tear to avoid raising an inference that Palmer had been raped before she was murdered. Brown also explained that he did not attempt to introduce Moline's statements under the unavailable declarant hearsay exception because that rule was not available in

Idaho at the time of the trial. Paradis has not demonstrated that his counsel's representation during the trial was ineffective.

E. Procedural Default: Prosecutorial Misconduct and Improper Venue Claims

Paradis contends that the misconduct of the prosecutor and the trial court's refusal to grant a change of venue deprived him of a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments. We are precluded from reviewing these claims because the Idaho Supreme Court refused to consider them on an independent state ground.

In Coleman v. Thompson, ___ U.S. ___, 111 S. Ct. 2546, 115 L.Ed.2d 640, 59 U.S.L.W. 4789 (1991), the Supreme Court reiterated the principle that a district court should not review an alleged violation of federal law if the state court's decision rests on an independent state ground. 111 S. Ct. at 2565. The court explained the rule applicable to state prisoner habeas petitions as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id.

Before a state procedural default can bar consideration of a federal claim, the last state court rendering a judgment must " 'clearly and expressly' state that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. 255 (1988) (citations omitted). In Paradis, 716 P.2d 1306, the Idaho Supreme Court explicitly refused to review Paradis' claims of prosecutorial misconduct and improper venue "because of the rule in Idaho that issues which could have and should have been raised on direct appeal will not be allowed to be raised in a post-conviction proceeding." Id. at 1317. Because the Idaho Supreme Court clearly rested its decision to refuse to consider Paradis' federal constitutional claims on independent state grounds, we cannot review their merits.

1. Adequacy of the Procedural Default.

Paradis argues that Idaho has not consistently applied the procedural rule which requires that claims considered in postconviction [sic] proceedings must have been raised on direct appeal. In order to be adequate as a procedural bar to federal habeas corpus proceedings, the independent state grounds must be regularly and consistently applied. Dugger v. Adams, 489 U.S. 401, 410 n. 6, (1989); Johnson v. Mississippi, 486 U.S. 578, 587 (1988).

Paradis relies on Judge Burnett's concurring opinion in State v. Darbin, 708 P.2d 921 (Idaho App. 1985) to support his claim. There, Judge Burnett noted that the Idaho courts had inconsistently applied the rule that res judicata precluded issues decided on direct appeal from being raised again in post-conviction hearings. However, in refusing to hear Paradis' prosecutorial misconduct and

venue claims, the Idaho Supreme Court did not rely on the rule criticized by Judge Burnett. Instead, citing Watkins v. State, 620 P.2d 792, 793-94 (1980), it denied his claims based on the principle that "issues which could have and should have been raised on direct appeal will not be allowed to be raised in a post-conviction proceeding," Paradis, 716 P.2d at 1317. No showing has been made that the procedural rule set forth in Watkins has been irregularly applied by the Idaho courts. Paradis has failed to demonstrate that the independent state ground relied upon by the Idaho Supreme Court in rejecting Paradis' federal constitutional claims has been inconsistently applied.

Paradis argues further that the Idaho Supreme Court misapplied Idaho law in holding that the state had not waived the "affirmative defense" of procedural default by failing to raise this defense prior to oral argument. We cannot consider the merits of this contention because federal courts lack the jurisdiction in state prisoner habeas corpus proceedings to determine whether state law was properly applied. Estelle v. McGuire, 60 U.S.L.W. 4015, 4017 (1991).

2. Cause for the Procedural Default.

Because of the valid state procedural bar, we may not consider the merits of Paradis' claims of prosecutorial misconduct and improper venue unless Paradis can "demonstrate cause for the default and actual prejudice." Coleman, 111 S. Ct. at 2565. Paradis contends that the procedural default should be excused because he received ineffective assistance of counsel on appeal. In Murray v. Carrier, 477 U.S. 478 (1986), the Supreme Court

explained the standard for determining whether counsel's performance on appeal can excuse a state procedural default:

> [T]he question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, supra, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Id. at 488.

Paradis does not contend that an external factor prohibited his counsel from raising the prosecutorial misconduct and improper venue claims in state court. He must, therefore, show that Brown's failure to raise the prosecutorial misconduct and improper venue issues on appeal constituted ineffective assistance under the Strickland standard.

Paradis' claim that his procedural default should be excused because his counsel failed to object to prosecutorial misconduct at trial and failed to raise the issue on appeal lacks merit. Paradis must demonstrate that his counsel's failure to respond to the following alleged prosecutorial misconduct comprised constitutionally ineffective assistance of counsel: (1) the prosecutor's statement

in closing argument which implied that Paradis killed Currier, (2) the prosecutor's statement in closing argument that Paradis could not be retried for Palmer's murder and "no other jury . . . can do your job now," (3) the prosecutor's statement that Paradis "frolicked all night" with alibi witness Aera Beaver, and (4) the prosecutor's "lengthy and personal attack" on Beaver.

We reject Paradis' contention that his counsel's failure to respond to the prosecutor's statement during closing argument which implied that Paradis killed Currier established constitutionally ineffective assistance of counsel. The jury was explicitly informed that Paradis had been found not guilty of the murder of Currier. Throughout the entire trial, Paradis' counsel objected to the introduction of all evidence relating to Currier's murder. Paradis 667 F. Supp. at 1385.

Paradis also contends that the prosecutor's statement during closing argument that no other jury could try him for the murder of Palmer encouraged the jurors to convict Paradis regardless of whether the state had carried its burden of proving Palmer was killed in Idaho. Paradis has failed to present any evidence to support this speculation. The question whether Palmer was murdered in Idaho was hotly contested before the jury. Paradis, 667 F. Supp. at 1373. Moreover, the jurors were instructed to acquit Paradis if they found the murder did not occur in Idaho. Id. In light of these circumstances, Paradis has failed to rebut the presumption that Brown's failure to object to the prosecutor's statements made in closing argument "might be considered sound trial strategy." Strickland, 466 U.S. at 689, (quoting Michel, 350 U.S. at 101).

The prosecutor's statement that Paradis "frolicked all night" with Beaver was based on Beaver's testimony that Paradis spent the night with her. We agree with the district court that the state prosecutor did go "overboard" in attacking Beaver's credibility. 667 F. Supp. at 1372. The record shows, however, that the prosecutor backed away from that attack by stating that he had perhaps been too harsh on Beaver, and that the jurors were to be the sole judges of Beaver's credibility. In light of the prosecutor's retreat, Paradis has failed to demonstrate that Brown's failure to object was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

The failure of Paradis' counsel to raise the proper venue issue on appeal did not constitute ineffective assistance of counsel. Brown testified at the evidentiary hearing that he chose not to challenge the trial court's denial of his change of venue motion because he considered that argument weak, and he wanted to focus on better arguments in the appeal. Paradis, 667 F. Supp. at 1370. Paradis's counsel was well within the bounds of professional conduct in abandoning the venue argument and focusing on stronger issues. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983).

We conclude that neither Brown's failure to object to alleged acts of prosecutorial misconduct nor his failure to raise the venue issue constituted ineffective assistance of

counsel. Accordingly, the procedural default in state court precludes our review of the merits of these issues.

II.

Death Sentence

The state trial court sentenced Paradis to death based solely on its finding that Paradis demonstrated "utter disregard for human life" within the meaning of Idaho Code 19-2515(g)(6). In Creech v. Arave, 947 F.2d 873 (9th Cir. 1991), we held the statutory aggravating circumstance listed in section 19-2515(g)(6) to be unconstitutionally vague. Id. at 882-85. We found that "the utter disregard for human life" aggravating circumstance did not permit "the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." Id. at 883, (quoting Lewis v. Jeffers, U.S. 110 S. Ct. 3092, 3099, 111 L.Ed.2d 606 (1990)). Since the sole statutory factor relied on by the trial court in imposing the death sentence is unconstitutional, the death sentence cannot stand.

We AFFIRM the denial of habeas corpus relief with respect to the guilt phase of Paradis' state trial. We REVERSE the denial of petitioner's habeas corpus petition with respect to the sentencing phase of Paradis' state trial. Accordingly, we direct the district court to grant the habeas corpus petition on Paradis' claim that the state trial court relied on an improper aggravating circumstance in imposing the penalty of death. The district court shall issue a writ requiring Paradis' release unless, within a reasonable time set by the district court, the Idaho court resentences Paradis.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD PARADIS, Petitioner-Appellant, v. A. J. ARAVE, Warden, Idaho State Penitentiary; AL MURPHY, Director, Idaho State Correctional Institution, Respondents-Appellees.	No. 87-4100 D.C. No. CV-86-1188-HLR ORDER (Filed June 9, 1992)

Before: ALARCON, BEEZER, Circuit Judges, and NIELSEN,* District Judge

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges and [sic] Alarcon and Beezer have voted to reject the suggestion for a rehearing en banc. Judge Nielsen would so recommend.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Leland C. Nielsen, United States District Judge for the Southern District of San Diego, sitting by designation.

No. 92-418 (2)

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
October Term, 1992

A.J. ARAVE, WARDEN,

Petitioner,

v.

DONALD M. PARADIS,

Respondent.

Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-418

In The
Supreme Court of the United States
October Term, 1992

A.J. ARAVE, WARDEN,

Petitioner,

v.

DONALD M. PARADIS,

Respondent.

Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Donald M. Paradis submits this memorandum of law in opposition to the petition of A.J. Arave, Warden of the Idaho State Maximum Security Institution, for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals granting Paradis' habeas corpus petition with respect to the sentencing phase of Paradis' state trial.

STATUTORY PROVISION AND RULE OF THE SUPREME COURT

28 U.S.C. § 2101(c) provides, in relevant part:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the supreme court for review shall be taken or applied for within ninety days after the entry of such judgment or decree . . . .

Supreme Court Rule 13 provides, in relevant part:

> REVIEW OF CERTIORARI; TIME FOR PETITIONING
>
> .1. A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment . . . .
>
> * * *
>
> .4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgement. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

STATEMENT OF THE CASE

Respondent Paradis was convicted, on the basis of wholly circumstantial evidence, of aiding and abetting in the murder of one Kimberly Palmer in Idaho. State v. Paradis, 106 Idaho 117, 676 P.2d 31, 35 (Idaho 1983) cert. denied, 468 U.S. 1220 (1984). The sentencing judge concluded that the defendant exhibited "utter disregard for human life"

pursuant to Idaho Code 19-2515(g)(6) even though he could not find that Paradis had killed Palmer. In reliance on this aggravating circumstance alone, the sentencing judge condemned Paradis to death. Findings at 16.[1]

Respondent Paradis appealed his conviction and sentence in the state courts of Idaho and sought habeas corpus relief in state and federal courts, maintaining, among other things, that he is innocent of the crime of which he has been convicted and that the evidence adduced at trial did not establish his guilt. In fact, since the Paradis trial, one Thomas Gibson has admitted that he killed Palmer in Washington and that Paradis had no part in her death. Additionally, since the denial of Paradis' habeas corpus petition in federal district court, one Larry Evans, the third man purportedly involved in Palmer's murder in circumstances indistinguishable from Paradis has been acquitted of Palmer's murder.

The United States District Court for the District of Idaho denied Paradis' claim for habeas corpus relief. Paradis v. Arave, 667 F. Supp. 1361 (D. Idaho 1987), aff'd in part, rev'd in part, 954 F.2d 1483 (9th Cir. 1992). On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's decision with respect to guilt. However, the Court of Appeals for the Ninth Circuit reversed the district court's denial of Paradis' habeas corpus petition with respect to Paradis' sentence of death and directed the district court to grant the habeas corpus petition on Paradis' claim that the state trial court had relied on an improper aggravating circumstance in imposing the penalty of death. 954 F.2d at 1495. Paradis'

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[1] The Findings of the Court in Considering Death Penalty Under Section 19-2515 Idaho code dated April 2, 1982 are referred to herein as "Findings at ___."

remaining claims regarding his sentence were thereby rendered moot and left undecided by the Ninth Circuit.

The judgment of the Ninth Circuit was rendered on January 23, 1992. On February 13, 1992 Paradis filed a Suggestion for Rehearing En Banc, see Appendix A, which was denied by the Court of Appeals by its order filed June 9, 1992. See Petition, App. 27. The Petition for Writ of Certiorari before this Court was not filed until September 1, 1992.

SUMMARY OF ARGUMENT

The petition for writ of certiorari must be denied because it was filed more than ninety days after the entry of judgment below on January 23, 1992. On February 13, 1992 Respondent Paradis filed a "Suggestion for Rehearing En Banc" pursuant to Fed. R. App. P. 35(b). Paradis' Suggestion does not toll the applicable ninety day period. See Sup. Ct. R. 13.4. The rules provide that if a "petition for rehearing" is timely filed, "the time for filing a petition for writ of certiorari runs from the date of denial of the petition." Id. Paradis, however, did not file a petition for rehearing. The rules further provide that "[a] suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule." Id. Therefore, the ninety day period was not tolled and this Court lacks jurisdiction to grant the petition for writ of certiorari of Petitioner Arave.

In addition, the Ninth Circuit's decision that the utter disregard aggravating circumstance, as defined by the Idaho Supreme Court, is unconstitutionally vague is both correct and consistent with the decisions of this Court. Before Paradis was sentenced, the

Idaho Supreme Court had already held that I.C. § 19-2515(g)(6), which permitted the sentence of death to be imposed where "the defendant exhibits utter disregard for human life," was unconstitutionally vague on its face. State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981). The Idaho Supreme Court then attempted to limit the statutory language and defined "utter disregard for human life" to be "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." Id. at 200-201.

The Osborn court's construction of "utter disregard," however, merely replaces one set of vague terms with another. It gives no guidance whatsoever to the sentencing judge and is itself unconstitutionally vague. See Walton v. Arizona, 110 S. Ct. 3047 (1990); Lewis v. Jeffers, 110 S. Ct. 3092 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). Indeed, given the lack of guidance provided by the Osborn construction, the sentencing judge in Paradis was compelled, to rely upon, among other things, his own notions of so-called "normal" and "common place" murders to support his finding of "utter disregard". The Ninth Circuit correctly held such reliance impermissible under this Court's precedent.

REASONS FOR DENYING THE PETITION

Point I

THE PETITION MUST BE DISMISSED BECAUSE IT WAS FILED MORE THAN NINETY DAYS AFTER THE ENTRY OF JUDGMENT

1. Petitioner Arave Had Ninety Days From The Date Judgment Was Entered To File A Petition For Writ Of Certiorari

"A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals, . . . shall be deemed in time when it is filed with the Clerk of this Court within ninety days of the entry of the judgment." Sup. Ct. R. 13.1; see also 28 U.S.C. § 2101(c). "The 90-day limit is mandatory and jurisdictional." Missouri v. Jenkins, 495 U.S. 33, 45 (1990). A petition not filed within ninety days of the entry of the Court of Appeals' judgment must be dismissed. Id.; see also Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971) (petition denied where it was filed one day late); Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942); cf. Coleman v. Thompson, 111 S. Ct. 2546 (1991) (filing of notice of appeal one day late constituted adequate and independent state ground to support state supreme court's judgment).

"[I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Sup. Ct. R. 13.4. "A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of [Rule 13.4]." Id. It has been the Supreme Court's "consistent practice to treat suggestions for rehearing in banc presented to the United States Courts of Appeals that do not

also include petitions for rehearing by the panel as not tolling the period for seeking certiorari." Jenkins, 495 U.S. at 46.

The opinion of the Court of Appeals for the Ninth Circuit in Paradis v. Arave, 954 F.2d 1483, was filed on January 23, 1992 and judgment was entered on that date. The petition for writ of certiorari was not filed in this Court until September 1, 1992, two hundred and twenty-two days, i.e., more than ninety days, after January 23, 1992.

2. Respondent Paradis Did Not File A Petition For Rehearing And, Consequently, The Ninety Day Period Was Not Tolled

On February 13, 1992 Respondent Paradis filed a "Suggestion For Rehearing En Banc" in the Court of Appeals for the Ninth Circuit, a copy of which is annexed hereto as Appendix A. This document could not be interpreted to be a petition for rehearing within the meaning of Rule 13.4 of this Court and is in form and substance a Suggestion, and not a petition for rehearing, because:

(a) It is clearly denominated as a SUGGESTION FOR REHEARING EN BANC;

(b) It states "Petitioner Donald M. Paradis, by his attorneys, respectfully suggests that this case be heard en banc because . . . ." and

(c) It concludes, "The panel's decision affirming Paradis' guilt should be reviewed en banc and vacated for the reasons set forth above."

In fact, there is nothing in the "Suggestion For Rehearing En Banc" which could lead one to conclude that the Suggestion is a petition for rehearing.

The order of the Court of Appeals dated June 9, 1992 denying Paradis' Suggestion also stated also that "the petition for rehearing is denied." See Petition p. 27. However, the

language of the order is clearly erroneous. "The Court of Appeals of course cannot make the record what it is not." Jenkins, 495 U.S. at 49. Consequently, the mere fact that the June 9, 1992 Order stated that a purported petition for rehearing was denied does not mean that Paradis' timely filed a petition for rehearing, nor can it turn Paradis' Suggestion into a petition for rehearing and thereby toll the ninety-day time period for the filing of a petition for writ of certiorari. Cf. Jenkins, 495 U.S. at 49. ("The time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time.")

Petitioner cannot claim to have relied upon the June 9 Order in determining when to file the Petition for Writ of Certiorari, because the ninety day time period for the filing of the Petition expired six weeks before the June 9 Order was entered. Having failed to timely file its Petition, but knowing that this Court has granted certiorari in the Creech case, Petitioner is attempting to circumvent the rules by basing jurisdiction in this court upon the Ninth Circuit's order purportedly denying a petition for rehearing, but fails to inform this Court that Paradis had filed no such petition. Petitioner cannot base jurisdiction on an order which it knows is erroneous.

In addition, the June 9 Order does not represent any thoughtful consideration by the Ninth Circuit regarding the proper characterization of Paradis' Suggestion. It is a standard form order apparently issued as the result of a ministerial error. On July 16, 1992 Paradis' counsel wrote to the Clerk of the Court of Appeals requesting a corrected order with a copy to counsel for Petitioner. While the letter was apparently never received by the clerk, a deputy clerk has since orally informed Paradis' counsel that the order was a standard form order issued

irrespective of the fact that a petition for rehearing had not actually been filed and had nothing to do with the form or substance of Paradis' Suggestion.

Moreover, unlike in Missouri v. Jenkins, 495 U.S. 33 (1990), any characterization of Paradis' Suggestion by the Ninth Circuit cannot be at issue. In Jenkins, the document filed in the Court of Appeals was quite ambiguously designated as a "Petition for Rehearing En Banc." 495 U.S. at 46-47. Since it was unclear whether the document was a Petition for Rehearing or a Suggestion for Rehearing En Banc (there being no such thing as a Petition for Rehearing En Banc) this Court looked to the characterization of that document by the Court of Appeals. In this case, the document filed by Paradis in the Ninth Circuit was unambiguously denominated as a "Suggestion for Rehearing En Banc" and could not be confused with a petition for rehearing. This Court need not examine the intent behind this order, and to base a determination regarding the document's true nature upon the Ninth Circuit's June 9 order would be to permit the clerk of the Ninth Circuit inadvertently to recharacterize Paradis' Suggestion and make the record what it is not.

Point II

THE NINTH CIRCUIT CORRECTLY HELD THAT THE UTTER DISREGARD AGGRAVATING CIRCUMSTANCE PURSUANT TO WHICH PARADIS WAS CONDEMNED TO DEATH WAS UNCONSTITUTIONALLY VAGUE

1. The Idaho Utter Disregard Aggravating Circumstance Provides No Guidance to the Sentencing Judge

The sole aggravating circumstance that the sentencing judge found to exist was "that the murder and the circumstances surrounding its commission, that the defendant [Paradis] exhibited utter disregard for human life" within the meaning of Idaho Code § 19-2515(g)(6).[2] Findings at 12-13. This statutory section is unconstitutionally vague as it provides "[n]o meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238 (1972); See also Gregg v. Georgia, 428 U.S. 153 (1976). Indeed, the Idaho Supreme Court, recognizing that § 19-2515(g)(6) does not meet constitutional standards, has held that "inasmuch as a reasonable person could fairly characterize every murder . . . as exhibiting 'utter disregard for human life' it is equally apparent under Godfrey that this court must place a limiting construction upon . . . [this] statutory aggravating circumstance . . . so as to avoid the possibility of . . . [its] application in an unconstitutional manner." State v. Osborn, 102 Idaho 405, 631 P.2d 187, 200 (1981).

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[2] At the time of Paradis' sentencing hearing, § 19-2515(f)(6) provided the utter disregard aggravating circumstance. "In 1984, I.C. § 19-2515 was amended and section (f) became section (g). The language of the new section (g) and its subsections is identical to the language of the former section (f) and its subsections." State v. Caudill, 109 Idaho 222, 706 P.2d 456, 463 (1985).

The Idaho Supreme Court in State v. Osborn attempted to place a constitutionally sufficient limiting construction upon I.C. §19-2515(g)(6), but it did not succeed. Osborn was the only interpretation of § 19-2515(g)(6) by the Idaho Supreme Court available to the sentencing judge in the Paradis case. In Osborn, the Idaho Supreme Court interpreted the phrase "utter disregard for human life" as follows:

> to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.

Osborn, 631 P.2d at 201.

The Court of Appeals for the Ninth Circuit held in this case that the limiting construction placed upon the utter disregard aggravating circumstance by the Idaho Supreme Court was also unconstitutionally vague. 954 F.2d at 1495. The Petitioner now asserts that the Ninth Circuit's decision "threatens to open a new chapter in death penalty litigation in which the dominant theme will be that state courts must define all potentially subjective terms with lists of specific acts." Petition, p. 12. This misconstrues and misstates the Ninth Circuit's holding, which did no more than apply the law recently set forth by this Court in Walton v. Arizona, 110 S. Ct. 3047 (1990) and Lewis v. Jeffers, 110 S. Ct. 3092 (1990) and require that Idaho's aggravating circumstance give "some guidance" to the sentencer and make rationally reviewable the process for imposing a sentence of death. See Creech v. Arave, 947 F.2d 873, 879 (9th Cir. 1991) cert. granted, 112 S. Ct. 2963 (1992).

First, the Osborn language is vague on its face, as vague at the statutory language it purports to define. The phrase of the definition, "the highest, utmost, callous disregard for human life" is simply a restatement of, and indistinguishable from, the unconstitutional phrase

"utter disregard for human life." Cf., Maynard v. Cartwright, 486 U.S. 356, 364 (1988) (the word "especially" does not provide the necessary guidance). "Utter" is synonymous with "highest" and "utmost." Of course, any disregard for human life is essentially "callous."

The sentencing judge acknowledged that the term "pitiless" gave him no guidance whatsoever and stated: "The term pitiless adds little, if anything." Findings at 13.

There is only one term remaining in the Osborn definition, "cold-blooded", which also provides no clear and objective standard or limiting guidance. Cf. Moore v. Clarke, 904 F.2d 1226, 1230 (8th Cir. 1990), rehearing denied, 951 F.2d 895 (8th Cir. 1991), cert. denied, 112 S. Ct. 1995 (1992) (although the phrase "coldly-calculated" may have an "aura of objectivity about it," considered with "absence of regard for human life language," the phrase is unconstitutionally vague).

In Moore v. Clarke, the Court of Appeals for the Eighth Circuit considered the Nebraska Supreme Court's limiting construction of the especially heinous aggravating circumstance.[3] The Court of Appeals held that "the phrase, 'so coldly calculated as to indicate a state of mind totally and sensely bereft of regard for human life' offers little, if any objective guidance." Moore, 904 F.2d at 1232. This phrase is essentially indistinguishable from the Osborn construction.

Like the Ninth Circuit, the Eighth Circuit in Moore considered the effect of Walton and Jeffers on its decision. Moore v. Clarke, 951 F.2d 895 (8th Cir. 1991). The Eighth Circuit concluded that "Jeffers reasserts the requirement that a state "'channel the sentencer's discretion

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[3] In Moore, the Nebraska Supreme Court had defined the especially heinous aggravating circumstance in terms of disregard for human life. In the Paradis case, the State did not even try to prove the especially heinous aggravating circumstance, even though the Idaho Supreme Court had adopted the Nebraska Supreme Court's definition of the especially heinous aggravating circumstance. See Osborn, 631 P.2d at 200.

by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."'" Jeffers, 110 S. Ct. at 3099 (quoting Godfrey v. Georgia, 446 U.S. 420 (1980)." 951 F.2d at 896. This Court declined to review the Eighth Circuit's decision in Moore. Moore v. Clarke, 112 S. Ct. 1995 (1992).

The Osborn language is readily distinguishable from the limiting definitions which the Supreme Court upheld in Walton and Jeffers. In Walton, the Supreme Court approved a limiting definition of "especially heinous, cruel or depraved" which had been construed by the Arizona Supreme Court to require that it be found beyond a reasonable doubt that the perpetrator inflicted mental anguish or physical abuse before the victim's death. Walton, 110 S. Ct. at 3057-58. Likewise, in Jeffers the Supreme Court held that "a rational factfinder could have found that respondent both relished the crime and inflicted gratuitous violence on the victim," as required by the Arizona Supreme Court's definition. Jeffers, 110 S. Ct. at 3104 (emphasis added). Walton and Jeffers each held that a limiting definition requires the sentencing judge to find objective facts, such as mental anguish, physical abuse, relishment of the crime or gratuitous violence. Unlike the limiting definition at issue in Walton and Jeffers, the Idaho language of utter disregard allows the sentencing judge to apply his unchannelled judgment, does not require him to find any objective facts and does not impose a process on the sentencing judge which can be rationally reviewed.

Moreover, the Osborn language permits utter disregard for human life to be based on unspecified acts or circumstances surrounding the crime. The Osborn language allows the sentencing judge to rely upon the totality of the circumstances surrounding the crime. It allows

the sentencing judge to rely upon those acts not even committed by the defendant.[4] Courts have consistently held that language permitting the sentencer to rely upon the circumstances surrounding a crime when imposing the death sentence is unconstitutional. See Moore v. Clarke 904 F.2d 1226, 1231 (8th Cir. 1990); Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir., 1987), aff'd, 486 U.S. 356 (1988). In rejecting language similar to the Osborn definition which referred to the circumstances surrounding the murder, the Tenth Circuit held:

> We agree that all the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible, reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous, atrocious, or cruel," the meaning that the sentencer attached to the provision "can only be the subject of sheer speculation." Godfrey, 428 U.S. at 429 . . . . The discretion of a sentencer who can rely upon all of the circumstances of a murder is a complete and as unbridled as the discretion afforded the jury in Furman. No objective standards limit that discretion.

Cartwright, 822 F.2d at 1491.

2. The Vagueness of the Osborn Construction Is Apparent From Its Application to Paradis

The vagueness and breadth of the Osborn construction is readily apparent from its application to Donald Paradis.

Osborn's definition of the utter disregard aggravating circumstance provided an example: the cold-blooded, pitiless slayer. This example is irreconcilable with Paradis' conduct under the

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[4] The Osborn language omits the statutory requirement that the defendant exhibit utter disregard for human life. In this manner, the construction by the Idaho Supreme Court actually invites an expansion of the statutory language.

prosecution's theory of the case. The state has maintained that one Scott Currier had been killed in Washington, although not by Paradis. Petition, p. 6. Currier's body was then placed in a van with Palmer and Gibson and taken to Idaho. Id. At some point before Palmer was killed, Paradis and Evans joined the van. Findings at p. 10. Then "Palmer escaped and was chased down a steep hill, caught and strangled to death by Paradis or one of the others." Petition, p. 7.

Under the prosecution's theory, Palmer's killer acted quickly upon her attempted escape. It was never proven that Paradis had planned and premeditated Palmer's murder. In fact, the sentencing judge expressly held that he could not find that Paradis killed Palmer and could not find how long before the murder Paradis had joined Gibson and Evans in the van. Findings at p. 10-11. Given the vagueness of the utter disregard definition, the sentencing judge was nonetheless able to find that Paradis satisfied the Osborn definition of "cold-blooded" and found "utter disregard."

The vagueness of the utter disregard aggravating circumstance also made it possible for the sentencing judge to conclude that the killing of a potential witness necessarily demonstrated utter disregard for human life. Although the sentencing judge could not find that Paradis killed Palmer, he concluded that Palmer was killed because she was a potential witness to the murder of Scott Currier (for which Paradis had been acquitted), notwithstanding that he expressly acknowledged that he could not find Paradis was present when Currier was killed. Findings at 9. The sentencing judge expressly found that "the motive for the killing of . . . Palmer in and of itself is substantial evidence that the commission of her murder was accomplished for reasons,

and under circumstances which exhibit an utter disregard for human life . . ."[5] Findings at 14. Neither the statute, I.C. § 19-2515(g)(6), nor Osborn, nor any other case except that of Paradis' codefendant, Thomas Gibson, have ever equated the murder of a potential witness with the utter disregard aggravating circumstance. However, the Osborn construction is so vague that it permitted the judge to call killing a potential witness "utter disregard" in this case. This is precisely the type of discretion which the Court, since Furman v. Georgia, has consistently held unconstitutional.

The most eloquent demonstration that the Osborn construction does not provide guidance to the sentencing judge, but leaves him unbridled discretion, are the words of the sentencing judge himself in deciding whether to find the "utter disregard" aggravating circumstance and condemn Donald Paradis to die:

> [T]he murder that was committed in this case was not what might be called a 'commonplace' murder, or what has sometimes been described as a 'normal' murder (if that can be possible). It did not involve an interfamilial situation or persons who were previously associated as do many, if not most, murders. There was not even a hint of any emotional upheaval as is often the case. There is no evidence that the use or abuse of alcohol or any controlled substance contributed to the situation as is usually the situation in the so-called "common" murder.

Findings at 16. Here, the judge was equating his sense of "abnormal" and "uncommon" murders with utter disregard, which is exactly what Godfrey, Maynard, Walton, and Jeffers

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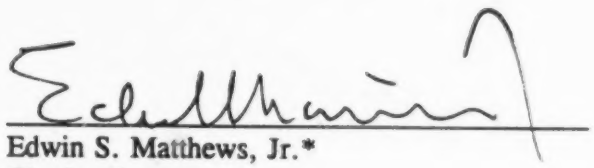
[5] The prosecution tried to prove a second aggravating circumstance, I.C. § 19-2515(f)(10), which was applicable when the murder was committed against a witness or potential witness in a criminal or civil proceeding. Findings at 7. The sentencing judge found that the (f)(10) aggravating circumstance was not applicable to Paradis. Findings at 13.

prohibit. If the Osborn construction of "utter disregard" had given any guidance to the sentencer, the sentencing judge could not have found an aggravating circumstance to exist in reliance upon his subjective conclusion that the murder was not "commonplace" or "normal."

Even if the utter disregard aggravating factor is capable of constitutional limitation, Idaho has not found one. Certainly, it did not do so in this case. The Ninth Circuit's decision here was clearly correct and dictated by this Court's precedent.

CONCLUSION

For the foregoing reasons, Respondent Paradis respectfully requests that this Court deny the petition for writ of certiorari.



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APPENDIX A

SUGGESTION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD M. PARADIS,	)	No. 87-4100
	)	
Petitioner-Appellant	)	District Court
	)	No. 86-1188
vs.	)	District of Idaho
	)	
A. J. ARAVE, Warden, Idaho State Correctional Institution, and AL MURPHY, Director of Idaho State Board of Corrections,	)	SUGGESTION FOR REHEARING EN BANC
	)	
Respondents-Appellees	)	CAPITAL CASE

PRELIMINARY STATEMENT

Petitioner Donald M. Paradis, by his attorneys, respectfully suggests that this case be heard en banc because: (1) the panel decision (the "Decision") overlooks material points of fact and law on Paradis' innocence, as outlined below; (2) the panel decision misapplies Jackson v. Virginia, and, if allowed to stand, would place this Circuit in conflict with other federal circuits because, inter alia, the Decision effectively applies a dramatically lesser or "some evidence" standard for appellate

review under Jackson v. Virginia; and (3) the panel decision misapplies 28 U.S.C. § 2254(d) and Sumner v. Mata, by improperly deferring to state court conclusions of law.

PROCEDURAL BACKGROUND

Paradis sought review by this Circuit of the denial by the U. S. District Court for the District of Idaho of his petition for a writ of habeas corpus with respect to his conviction and death sentence in Idaho. On January 23, 1992, after considering his appeal, the Circuit panel reversed the denial of Paradis' habeas corpus petition with respect to his sentence of death and ordered that he be resentenced, but affirmed the denial of habeas corpus relief with respect to the guilt phase of Paradis' trial, apparently misunderstanding clear and convincing evidence which is clearly irreconcilable with Paradis' guilt.

FACTS

Based solely upon circumstantial evidence, Paradis was convicted of aiding and abetting the murder of Kimberly Palmer up an isolated, dead-end road near Post Falls, Idaho, called Mellick Road. The victim's body was found partially submerged in a stream near Mellick Road. The body of her boyfriend, Scott Currier, who was killed in a house rented by Paradis 25 miles away in Spokane, Washington, was found nearby.

Paradis contends that he is innocent of Palmer's murder and that the victim was actually killed by one Thomas Gibson at Paradis's house in Spokane, Washington, and that the murder occurred hours before Gibson, Paradis and a third man, Larry Evans, brought her body to the Mellick Road site. Since Paradis' trial, Gibson, who was also convicted of Palmer's murder in

Idaho, has confessed several times to the murder of Palmer in Washington and has stated that the murder occurred when Paradis was not present and without Paradis' knowledge.[1] U.S. District Court Exhibit ("Exh.") 1,5,6 & 7. Paradis contends that, on returning home in Spokane early one morning, Paradis found the bodies of Palmer and Currier in his house, and, panicked and fearful, along with Gibson and Evans took the bodies out of his house and across the state line to Idaho. Based upon facts virtually identical to those before the jury in Paradis' case, Evans was acquitted of Palmer's murder because the jury could not find beyond a reasonable doubt that her murder had occurred in Idaho. Excerpts of Record, Tab 31 at 1.

In order to convict Paradis of murder, the State of Idaho had to prove beyond a reasonable doubt that the victim died at the Mellick Road site during a brief period of only a few minutes when Paradis, Gibson and Evans were present there. The evidence in the case came exclusively from two locations - Mellick Road in Idaho and the house in Spokane, Washington. The scientific evidence, discussed below, simply is irreconcilable with her death in Idaho, while the circumstantial evidence is equally consistent with her death either in Washington or Idaho.

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[1]The only existing direct testimony regarding what happened in the Spokane house, given by Gibson (at his trial and a later deposition), Rosanna Moline (to the Spokane police and at Paradis' Motion for a New Trial) and Larry Evans (at his trials in Idaho and Washington), supports Paradis' innocence of Palmer's murder.

ARGUMENT

THE PANEL OVERLOOKED CLEAR AND CONVINCING EVIDENCE OF INNOCENCE AND EFFECTIVELY HELD THAT A CONVICTION MUST BE UPHELD IF THERE IS SOME EVIDENCE OF GUILT, WHICH STANDARD WAS REJECTED IN JACKSON V. VIRGINIA, AND IMPROPERLY PRESUMED STATE COURT CONCLUSIONS OF LAW TO BE CORRECT IN VIOLATION OF SUMNER V. MATA

In determining whether the evidence was sufficient to support Paradis' conviction, the panel correctly stated the appropriate standard under Jackson v. Virginia, 443 U.S. 307 (1979), but misapplied that standard. As the panel noted, "Paradis is entitled to habeas corpus relief if it is found that upon the record evidence addressed at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Paradis v. Arave et al., No. 87-4100, slip op. at 672 (9th Cir. January 23, 1992) (citing Jackson, 443 U.S. at 324.) However, in applying Jackson the panel failed to recognize "that guilt should never be found except on a rationally supportable 'subjective state of near certitude.'" West v. Wright, 931 F.2d 262, 268 (4th Cir. 1991) (citing Jackson, 443 U.S. at 315) cert. granted , 112 S. Ct. 656 (1991).

"If the evidence is consistent with both guilt and innocence, it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); see also United States v. Sanchez-Mata, 925 F.2d 1166 (9th Cir. 1991) (conviction reversed where evidence was consistent with both innocence and guilt). As the Eleventh Circuit has stated:

> Jackson requires that a reasonable juror be able to find the defendant guilty beyond a reasonable doubt, and if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt.

Cosby v. Jones, 682 F.2d 1373, 1383 (11th Cir. 1982). A fortiori, where the evidence adduced at trial, when viewed in the light most favorable to the government, is inconsistent with guilt, as is the evidence in this case, the Jackson standard is not met and the conviction must be reversed.

A. The Panel Apparently Overlooked Evidence Establishing Paradis' Innocence

The most significant evidence of Paradis' innocence in this case are serious wounds on the victim's body that could not have been inflicted until at least 30 minutes to as long as several hours after her death. The undisputed postmortem character and timing of these wounds made it physically impossible for the victim to have been killed at Mellick Road in Idaho. It was impossible for Paradis, Gibson and Evans to kill the victim at the site and subsequently to inflict wounds at the site at least 30 minutes to as long as several hours after her death because Paradis, Gibson and Evans were only at the Mellick Road scene for no more than 30 minutes.[2] The only possible explanation of what happened that is wholly consistent with all the evidence in this case is that the victim had been killed in Washington several hours before her body was brought to Idaho and left near Mellick Road.

The postmortem wounds on Palmer's body included a deep, open tear, or cut, in her genitals (labia) caused by a sharp instrument.[3] This fact was noted as one of the three "ANATOMIC

[2]At Paradis' trial, a witness who lived nearby, Mrs. Jones, testified that she observed a van drive up Mellick Road and three men walk down the road about one-half hour later. Trial Transcript (hereinafter "TR")-II-236-37. The day after the body was found, she told the police it was approximately 15 minutes. U.S. District Court Exhibits ("Exh.") 69, Exhibit 8, p. 5.

[3]Other postmortem wounds included chest abrasions consistent with her body having been dragged across a floor after death. Evidentiary Hearing, U.S. District Court ("EH")-III-496; EH-II-635-36; Probable Cause Hearing, p.20.

DIAGNOSES" at the beginning of the autopsy report on the victim prepared by the State's forensic pathologist, Dr. Brady; he recorded this injury as "a 1 1/2 long tear with no evident vital reaction", a clear reference to the postmortem quality of its infliction. Exh. 36, p. 7 (emphasis added). Despite what appears in his autopsy report and what it reveals to a trained and alert reader, Dr. Brady did not mention the labia tear at all in his trial testimony. Surprisingly, the autopsy report on the victim was not admitted as an exhibit at the trial due to error by Paradis' counsel, see TR-IV-582-3, and Dr. Brady was not asked about the cut at the trial.[4] The only evidence of the cut presented at the trial was a mention thereof by defendant's pathologist, Dr. Larson.[5] These facts are unchallenged by the State.

A thorough examination of the evidence of this case demonstrates that the labia cut did not bleed, and thus must have been inflicted after death. The only evidence at the trial regarding the labia wound was the testimony of Dr. Larson that the cut probably occurred after death because there was no "reaction" or "redness" or "evidence of bleeding". See footnote 5, supra. The labia cut would have been prone to bleed as the genitals are a vascular area of the body and are prone to bleed when cut. EH-VI-997. In the habeas proceeding (i) Dr. Brady, the State's pathologist, testified that this cut was completely covered by the victim's jeans, EH-II-312-15, and would have

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[4]Paradis' defense counsel, who had only been admitted to the bar several months before, was handling his first jury trial and was totally inexperienced, did not understand the significance of the labia cut, did not cross examine Dr. Brady about it and did not mention the cut or what it revealed in his argument to the jury. Evidentiary hearing before U.S. District Court ("EH")-IV-665-67.

[5]Dr. Larson stated simply ". . . I tried to determine from the autopsy report what caused the cut on the external labia of the deceased in which it was stated in the report that this did not appear to be a wound that had been produced before death. Probably occurred after death because there was no reaction to it, no redness around it, no evidence of bleeding, no evidence of blood." TR-V-581.

bled into the jeans had it been inflicted at any time sooner than one-half hour to one hour or more after the victim's death. EH-II-316, 318; EH-V-887-88; Evans Transcript, Brady Testimony, at 90-91, Tab 29, (ii) Dr. Lindholm, another State pathologist, testified that bleeding from the wound would have soiled Palmer's jeans if it had been inflicted within 15 minutes following death. EH-VI-997-1000 & 1044, and (iii) the State's central crime lab employed a sophisticated luminol chemical test for the presence of blood in the jeans and confirmed that there was no trace of blood on the victim's jeans. EH-VI-1097-98 & 1126-27.

The panel nonetheless speculated that "the jury could have rationally inferred from all the evidence that any blood on the jeans was washed away by the combined effect of rain water and the effect of the stream," citing the trial testimony of a State criminalist that "exposure to water can interfere with the ability to detect human blood on clothing material." Paradis v. Arave, slip op. at 674. (emphasis supplied). However, the panel failed to consider that the uncontroverted evidence in the case was that the cut was inflicted after death, showed no vital reaction and did not bleed.

Moreover, the criminalist cited by the panel in support of its finding did not testify about the labia cut and was not referring to the labia cut when he testified about water's interference with the detection of blood on clothing. TR-III-377-90. This expert testified only as to certain specific exhibits, collected from the Spokane house, which related to the Currier murder and not to the Palmer murder. Further, the criminalist only testified that heat and water caused "denaturization" (chemical alteration) of blood samples and did not suggest that water would make blood disappear and become undetectable. Id.

The panel also overlooked the highly sensitive luminol tests performed on the victim's jeans and the conclusions of these tests introduced in the habeas proceedings. These tests confirmed that

the jeans contained no trace of blood. The panel further overlooked the fact that neither the rain nor the stream washed away the blood on other parts of the victim's body which were under water and uncovered, as compared with the labia cut, which was completely covered by the victim's jeans and above the stream water line. EH-II-312-315 (Brady testimony); Exh. 8 to Elliot Deposition, Tab 18. Plaintiff's Exhibits at Trial 100, 101 and 102. In summary, the panel's finding completely overlooks the most important evidence before it and instead engages in speculation over what the jury might have found, speculation which is completely unsupported by the trial record.

There is no evidence at all in this case that Palmer's body was assaulted at the Mellick Road site after it was left there and before it was found the next day, and no explanation has been offered of how the postmortem labia tear could have been inflicted, within the time sequence of the case, if the victim was killed at Mellick Road. The only possible, rational explanation is that the victim was killed in Spokane, Washington some hours before her body was brought to Mellick Road (so as to allow enough time for the postmortem wounds to have been inflicted 30 minutes to hours after death so that they would show no vital reaction and would not bleed) and that Paradis, Gibson and Evans were simply leaving her body at Mellick Road. Paradis, Gibson and Evans were not present at the Mellick Road site for a sufficiently long time to make it even possible that Paradis, or any of his codefendants, killed her there and subsequently inflicted the labia wound.[6]

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[6]It is simply impossible for any rational person to believe that, within a time span of only 15 to 30 minutes, while Paradis, Gibson and Evans were at Mellick Road, these three men could have performed all of the following acts that the State's theory of this case required they did while at the site: (1) drive .38 miles up a narrow, steep mountain road beyond Mrs. Jones' house where they were observed on arrival at Mellick Road and turn the van around, (2) drive the van off the road and turn it over, (3) carry a bag containing the heavy body of Scott Currier up the road and 20-25 feet down a steep embankment, thick with brush (see Exh. 33), (4) scatter numerous objects from the van all over the hillside (see id. and TR-III-212-14), (5) chase Palmer 80 feet down a steep, thickly wooded hillside through a barbed wire fence to a stream, (6) first

It is inconceivable that Paradis' conviction could be upheld in the face of this unchallenged evidence. The evidence pertaining to the labia cut, considered as a whole, provides clear and convincing proof that the determination of Paradis' guilt of a murder which allegedly occurred in Idaho was erroneous. It cannot be the law of this Circuit that a claim of innocence based on facts established in the record of the case and irreconcilable with guilt, be denied.

B. The Panel Misapplied Jackson v. Virginia

Although the panel recognized that Jackson requires reversal of Paradis' conviction if, based upon the record evidence adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt, Paradis v. Arave, slip op. at 672, the panel overlooked, or did not understand that, the above evidence is simply inconsistent with Paradis' guilt beyond a reasonable doubt even taken in the light most favorable to the prosecution, as required by Jackson. No rational trier of fact could have found Paradis guilty, based upon the State's circumstantial evidence, without ignoring the unchallenged evidence to the contrary.[7]

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strangle her from behind with her necklace (or ligature) and then manually strangle her from the front breaking her cricoid cartilage, (7) place her body in the stream before she was dead so she could aspirate water from the stream (as claimed by Dr. Brady), (8) remove her body from the stream, (9) wait for her to die and wait further for at least 30 minutes beyond death, (10) inflict the labia wound and other postmortem wounds on her body, (11) put her body back in the stream, (12) gather and place branches over the body, (13) climb 80 feet back up the steep embankment to the road and (14) walk .38 miles back down Mellick Road to Mrs. Jones' house where they were seen leaving the scene. (See TR-V-699-702). Although these facts were separately disclosed to the jury, Paradis' defense counsel, who based his defense on an equally preposterous alibi he knew, or should have known, was false, did not even suggest to the jury that the prosecution's scenario was impossible and contrary to reason.

[7]The other scientific evidence presented to the jury does not overcome the evidence that Palmer died in Washington. As the panel noted, Dr. Brady testified that the presence of fluid in the victim's lungs was "consistent" with her death in the stream, and held that Dr. Brady's

The evidence discussed above relating to the postmortem labia cut, provides a clear and convincing showing that it was physically impossible for Paradis to have killed Palmer in Idaho.[8] Although the panel invoked Jackson as a guide for those circumstances under which Paradis' conviction can stand, it nonetheless misapplied the Jackson test. It is well established that the Jackson test is not met where the evidence supports a finding of innocence as well as guilt. Varoz, 740 F.2d at 775; Cosby, 682 F.2d at 1383; see also United States v. Sanchez-Mata, 925 F.2d 1166 (9th Cir. 1991). Logic demands that where, as here, the evidence is weaker than in Cosby and actually produces a clear and convincing showing of innocence, no rational trier of fact could have found proof of guilt beyond a reasonable doubt, as required by Jackson.

Under the panel's own analysis, therefore, its holding cannot stand. It cannot be the law of this Circuit that such testimony, which supplies clear and convincing evidence of Paradis' innocence, could support a finding of guilt beyond a reasonable doubt which would satisfy the Jackson test. A reasonable doubt is not a grave or substantive doubt. Cage v. Louisiana, 111 S. Ct. 328 (1990).

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testimony on this issue supported the jury's finding that the murder occurred in Idaho. Paradis v. Arave, slip op. at 673. At the evidentiary hearing in the District Court, Dr. Brady testified that he did not mean that her aspiration of water was "more likely than not." EH-V-965; EH-II-347, V-962. Dr. Brady never said, because he could not say, that Palmer did not die in Washington. As for the other circumstantial evidence, the panel found that it, standing alone, was not sufficient to support the jury's verdict. Paradis v. Arave, slip op. at 674. Paradis has consistently argued to the district court and to the appellate panel that this proof fails to substantiate proof of guilt beyond a reasonable doubt. The panel's decision erroneously reaches a contrary conclusion without any mention whatsoever of whether an opinion of "consistency" can substitute for the requirement of "probability" in meeting the State's burden of proof. This fundamental question alone demands reconsideration on en banc review.

[8] "Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required." Civil Pattern Jury Instructions, p. 18 (5th Cir. 1991).

A reasonable doubt is one which causes a rational person to "hesitate to act". See United States v. Wosepka, 757 F.2d 1006, mod. 787 F.2d 1294 (9th Cir. 1985). Proof beyond a reasonable doubt is proof of such convincing character that a rational person would be willing to act upon it without hesitation in the most important of that person's affairs. United States v. Newport 747 F.2d 1307, 1308 (9th Cir. 1984). Because there is clear and convincing evidence of Paradis' innocence, the Jackson test cannot be satisfied, as no rational jury could have found proof of Paradis' guilt beyond a reasonable doubt.

Likewise, the Idaho Supreme Court's holding did not meet the Jackson standard. The Idaho Supreme Court only concluded, after its review of the record, that there was evidence suggesting that Palmer was still alive in Idaho. State v. Paradis, 676 P.2d 31, 33 (Idaho 1983). Even presuming that the state court's holding that there was evidence suggesting that Palmer was alive in Idaho was correct, the holding did not, and cannot under Jackson, support the conclusion that a rational jury could have found beyond a reasonable doubt that Palmer was murdered in Idaho. The Idaho Supreme Court only found some evidence, merely a "suggestion", that Palmer was alive in Idaho.

Given the evidence of the postmortem labia wound, it is not plausible to conclude that a rational jury would have no hesitation or doubt in finding that Palmer died in Idaho. Essentially, the panel's opinion ignores the meaning of Jackson, and effectively replaces it with a new and lesser test. Under the panel's reasoning where there is some evidence consistent with the elements of the crime charged, and scientific medical evidence that is inconsistent with that evidence, a verdict can be upheld. This standard is even less stringent than the standard of review in a civil case (a preponderance of the evidence) and under the panel's standard, the prosecution would fail only

where there was a total absence of probative evidence; this "no evidence" standard was rejected in Jackson. See Cosby, 682 F.2d at 1383 n.21.

C. The Panel Misapplied Summer v. Mata

In order to conclude that the evidence produced at the trial was sufficient to persuade a rational jury that the victim died in Idaho, the panel incorrectly applied a presumption of correctness to the state court's legal findings that were not factual findings and, contrary to the panel's analysis, did not require proof beyond a reasonable doubt.

Applying a presumption of correctness, pursuant to 28 U.S.C. 2254(d), to the Idaho Supreme Court's decision and treating that decision as a "finding", the panel concluded that "there was evidence at trial suggesting that Palmer was still alive when she was placed in the stream bed." Paradis v. Arave, slip op. at 675 (emphasis supplied). In arriving at this conclusion, however, the panel overlooked the Supreme Court's decision in Sumner v. Mata, 455 U.S. 591 (1981), which held that mixed questions of law and fact are not governed by § 2254(d). Id. at 597. Sufficiency of the evidence is a mixed question of law and fact. Case v. Mondragon, 887 F.2d 1388 (10th Cir. 1989). Therefore, the panel should not have applied the presumption.

Even if it were correct to apply a presumption of correctness to the state court finding, and the state court had made a determination that the evidence was sufficient to find guilt beyond a reasonable doubt, the panel was required not to apply the presumption because the Idaho Supreme Court's finding of fact was not "fairly supported by the record." Sumner v. Mata, 455 U.S. at 592.

CONCLUSION

The panel's decision affirming Paradis' guilt should be reviewed en banc and vacated for the reasons set forth above.

Dated: February 13, 1992

Respectfully submitted,

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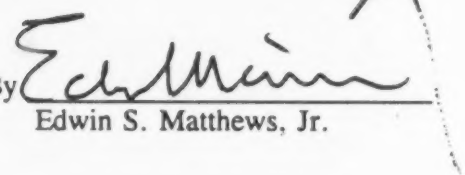
By 
Edwin S. Matthews, Jr.

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of February, 1992, I served a true and correct copy of the foregoing Suggestion for Rehearing En Banc or Petition for Rehearing on counsel for Respondents therein by placing a copy thereof in the United States mail, postage prepaid, addressed to:

Lynn E. Thomas, Esq.
Solicitor General
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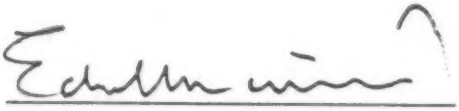

AFFIDAVIT OF SERVICE

STATE OF NEW YORK :
: SS.:
COUNTY OF NEW YORK :

June Cerra, being duly sworn, deposes and says:

On September 29, 1992 I served a true and exact copy of the annexed Brief in Opposition to Petition for Writ of Certiorari by placing a copy thereof in the United States mail, postage prepaid, addressed to:

Lynn E. Thomas, Esq.
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Boise, Idaho 83720

June Cerra

Sworn to before me this
29 day of September, 1992

Notary Public

ANN BUCHONG
Notary Public, State of New York
No. 01[illegible]
Qualified in New York County
Commission Expires Feb. 28, 1993

Supreme Court, U.S.
FILED
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No. 92-418

In The

Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

Petitioner,

v.

DONALD M. PARADIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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ARGUMENT

The Petition Was Timely Filed; The Court Of Appeals Treated Paradis' Pleading As A Petition For Rehearing

Respondent, Donald Paradis, asserts in his brief opposing a Writ of Certiorari that because he filed only what he called a "Suggestion for Rehearing En Banc," and not a petition for rehearing, the ninety-day period for filing a Petition for a Writ of Certiorari began running January 23, 1992, when the panel opinion was issued, and not on June 9, 1992, when the Court of Appeals issued an order denying *both* rehearing and a hearing *en banc*.

The Court of Appeals plainly treated Paradis' pleading as both a Petition for rehearing and for an en banc hearing. For one thing, the court said it had done so. The order denying rehearing reads:

> The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges and [sic] Alarcon and Beezer have voted to reject the suggestion for a rehearing en banc. Judge Nielsen would so recommend.
>
> The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).
>
> The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. App. 2, Petition.

In addition, the court's mandate was not issued until June 27, 1992, indicating plainly that the Court of Appeals understood that a petition for rehearing had been filed. See Rule 35 (c), Rules of Appellate Procedure (Pleading

limited to suggestion for en banc hearing does not stay mandate.) It is the practice of the Court of Appeals to treat all suggestions for rehearing en banc as petitions for rehearing. The internal operating procedures of the court provide:

> If a suggestion for rehearing en banc has been made, the panel will first make known to the other members of the Court its decision to deny rehearing, and its recommendation with regard to the en banc suggestion. II K. (2) (b), Statement of Internal Operating Procedures, United States Court of Appeals for the Ninth Circuit, (1983).

The fact that the Court of Appeals treated Respondent's pleading as a petition for rehearing, and thereby withheld its mandate until June 27, 1992, controls the question submitted and establishes that the jurisdictional date for filing the petition was ninety days from June 9, 1992, the date of denial of rehearing. In *Missouri v. Jenkins*, 495 U.S. 33 (1989), a case considering this issue, the Court found dispositive the fact that the Court of Appeals had treated a document denominated "Petition for Rehearing en banc" as a petition for rehearing and had in the meantime stayed its mandate.

> If the Eighth Circuit had regarded the State's papers as only a suggestion for rehearing in banc, without a petition for panel rehearing as well, Rules 35(c) and 41(a) of the Federal Rules of Appellate Procedure would have required the court to issue its mandate within 21 days of the entry of the panel's judgment. The Court of Appeals did not issue the mandate within 21 days of the panel's judgment, but issued it only upon its October 14 order denying the State's petition. Nor did the Court of Appeals issue an

> order extending the time for issuance of the mandate, as it may do under Rule 41(a).
>
> . . . We presume that the Eighth Circuit withheld the mandate because, under Rule 41(a), it must do so when a petition for panel rehearing is pending. 495 U.S. at 48-49.

The Court also noted a preference for the practice of circuits that have published rules giving notice that all suggestions for rehearing en banc will be treated as containing both petitions for rehearing and suggestions for hearing en banc.

The practice followed by the Court of Appeals was particularly appropriate in this case. The text of Respondent's "suggestion for rehearing en banc" contained material appropriate to a petition for rehearing. As the rules make clear, a suggestion for rehearing en banc is addressed to a rarely granted power of the court. An en banc hearing is generally not granted unless necessary to secure or maintain uniformity of decisions within the Court of Appeals or to resolve questions of exceptional importance. Rule 35, Rules of Appellate Procedure. A suggestion for rehearing en banc is not an appropriate vehicle for challenging the panel's interpretation of facts or ordinary legal errors that may be part of its opinion. *Id.* Respondent's pleading, which is appended to his response to the petition for certiorari, contained just such matter and put the Court of Appeals on notice that he was seeking relief in the nature of a rehearing.

CONCLUSION

The Petition for a Writ of Certiorari was timely filed within ninety days of the denial of rehearing.

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